Nos. 99-446, 99-551

IN THE

Supreme Court of the United States

BASSAM HINDI, *et al.*,

Petitioners,

v.

TOSCO CORPORATION, *et al.*,

Respondents.

-and-

CHARLES SIMMONS, *et al.*,

Petitioners,

v.

UNOCAL CORPORATION, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED BY SIMMONS AND HINDI PETITIONS

1. As to the Petition filed by the Simmons group only, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that Tosco's acquisition of Union Oil Company of California's ("Union Oil") west coast assets pursuant to Union Oil's withdrawal from the geographic market did not violate the timing and "discrimination" provisions of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-6 ("PMPA").

2. As to the Petitions filed by the Simmons and Hindi groups, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that the decision by Tosco Corporation to utilize synthetic leasing to finance a portion of the assets acquired from Union Oil did not contravene the PMPA.

3. As to the Petition filed by the Simmons group only, whether the District Court and Ninth Circuit Court of Appeals erred as a matter of law in determining that the Simmons group did not possess antitrust standing and had not suffered antitrust injury arising from Tosco's acquisition of Union Oil's west coast assets.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of Court, Respondents state as follows:

Tosco Corporation, T Northwest Properties II, Inc., and Clover Trust 1997-1, state that Tosco Corporation and Clover Trust 1997-1 do not have any parent corporations. T Northwest Properties II, Inc. is a wholly owned subsidiary of Tosco Corporation.

Union Oil is a wholly-owned subsidiary of Unocal Corporation.

There is no publicly held company that owns 10% or more of the stock of any Respondent.

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STATEMENT

1. Union Oil withdrew from the retail marketing of motor fuel in the states of Alaska, Arizona, California, Hawaii, Nevada, Oregon and Washington. In doing so, Union Oil sold its marketing assets to Tosco. A number of former Union Oil franchisees objected to the sale on various grounds mostly arising out of the PMPA. In separate rulings, the district court ruled against all of them. Four groups of plaintiffs appealed to the Ninth Circuit Court of Appeals. Of the four groups, only two — the Hindi and Simmons groups — filed Petitions for a Writ of Certiorari. Respondents address both Petitions in this brief.

2. Unocal conducted its petroleum refining, transportation, and marketing business by and through its wholly owned subsidiary, Union Oil. In 1994, Union Oil established a separate unincorporated business unit, the 76 Products Company, to manage its refining and marketing operations, including a chain of more than 1200 service stations in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. Those were operated under the terms of PMPA franchise agreements with Union Oil as the franchisor.

3. For several years, Unocal gave consideration to various ways of restructuring 76 Products, with the principal options being a spin-off of the entity, a joint venture arrangement, or a sale. Though early negotiations during the period fell through, Unocal continued to hear expressions of interest in acquiring the 76 Products business unit from several businesses, and in September 1996, began meeting with Tosco about the possibility that Tosco would purchase 76 Products. Nevertheless, other restructuring plans

continued and in October of 1996, Unocal management decided that the assets and employees of the 76 Products business unit should be transferred into a separate subsidiary. That plan was never consummated, but when it was announced, Unocal noted that it would be evaluating different options which could establish 76 Products as a separate entity, including an IPO, a joint venture, or a sale. Any future plans depended on the ability of 76 Products to develop sufficient earnings and cash flow as a stand alone business.

4. Discussions with Tosco continued, and by late October Tosco and Unocal were in active negotiations over a possible acquisition of 76 Products. Tosco offered to purchase the 76 Products business unit. The Union Oil board authorized a counter-offer on November 4, 1996, and a letter of intent calling for Union Oil to sell 76 Products to Tosco was signed by Tosco and Union Oil on November 17. Negotiation of specific agreements remained to be accomplished, and several conditions, including the approval of Union Oil's board, had to be met before the sale was formalized. On December 2, 1996, the Union Oil board conditionally approved the sale and purchase agreement and other agreements, and authorized Union Oil's management to enter into agreement with Tosco. The Management Committee of the Union Oil board authorized the signing of the sale and purchase agreement on December 13, 1996, and the sale then took place on December 14, 1996.

5. The assets sold included the premises of the "76" service stations, which were leased to the franchisees; Union Oil's interests in the franchise agreements with its dealers; the rights to the "76" and "Union 76" trademarks; and other assets, including refineries, pipelines, tankers, inventories, etc. The sale of 76 Products constituted a "market

withdrawal" as defined under the PMPA by Union Oil from the motor fuel market in Alaska, Arizona, California, Hawaii, Nevada, Oregon, and Washington. Union Oil was to terminate its franchises, but Tosco was also obligated to offer each Union Oil franchisee a nondiscriminatory, three-year petroleum marketing franchise. Between December 23 and 26, 1996, Union Oil sent all of its franchisees a letter notifying them of the termination or nonrenewal of their franchises, effective June 30, 1997, and, as required under the PMPA, Union Oil also notified the Governors of the affected states of its market withdrawal.

6. By April 15, 1997, Tosco offered petroleum marketing franchises, which were to become effective July 1, 1997, to the Union Oil franchisees. The new franchise contracts offered by Tosco essentially mirrored the prior contracts between Union Oil and the franchisees.

7. Tosco financed a portion of the acquisition through a secured financing vehicle known as synthetic leasing. None of the facts pertaining to Tosco's synthetic lease financing were disputed before the district court or the court of appeals. A synthetic lease is a financing arrangement first developed in the late 1980s and has become a commonly used means for publicly traded companies to finance asset acquisitions.

8. The synthetic lease is a form of financing structured to meet the Generally Accepted Accounting Principles ("GAAP") definition of an operating lease for accounting purposes, which gives the company off-balance sheet accounting treatment. At the same time, based on its attributes, the synthetic lease is viewed as a secured loan by the company for legal and tax purposes, since the company retains the risks and benefits of ownership of the assets being

financed. This financial structure is efficient because it provides low cost financing and is treated as an operating lease for book purposes. Therefore, neither the asset being financed nor the corresponding debt are reflected on the company's balance sheet, resulting in more competitive financial ratios, as is done by many of Tosco's competitors. (While the assets being financed and the corresponding liabilities do not appear in the financial statements, they are fully discussed in the Notes To Consolidated Financial Statements that are published with the financial statements.)

9. In the basic synthetic lease structure, a special purpose entity ("SPE") is formed to receive the loan from the lending institution, transmit the loan proceeds to the seller and acquire bare legal title to the properties. The SPE, here Respondent Clover Trust, is not an operating entity. The acquiring company or its subsidiary then enters into a short-term lease agreement with the SPE (with the SPE as lessor) with an option for the acquiring company to obtain title to the properties for a fixed price or pursuant to a fixed formula.

10. The acquiring company, here Tosco, assumes all operational and casualty risks of the properties and takes full responsibility for operating, maintaining and managing the assets. Because of these features, the lease appears and functions like a medium-term, revolving credit arrangement rather than a typical lease, with all the protections for the lessor in place that would apply in the case of a normal, medium-term, secured commercial loan to a company with a high credit rating.

11. Tax and bankruptcy authorities consider synthetic leases to be financing transactions, based primarily on factors such as the intent of the parties, the relatively small equity

investment by the SPE, the option to purchase the asset by the company at a later date, and the fact that all of the burdens, risks, rewards and responsibilities for the asset associated with ownership reside with the acquiring company (Tosco), which will enjoy any appreciation in the value of the property and bears the risk of asset depreciation. The Internal Revenue Service treats the transaction as a secured financing, viewing the company as the beneficial owner of the assets. The bankruptcy courts take the same approach, determining, based on the intent of the parties and the economic substance of the transaction, that the transaction should be treated as a financing arrangement.

12. Clover Trust was formed as the SPE to facilitate the "synthetic leasing" arrangement used by Tosco to finance a position of the purchase. Clover Trust received a loan from Sanwa Business Credit Corporation ("SBCC"), paid that money to Union Oil, took legal title to the properties and then entered into a short-term lease with Tosco's subsidiary, Northwest. Clover Trust agrees that its role in the transaction was to facilitate the acquisitions for Tosco. Tosco has the option of acquiring legal title via a fixed formula at the end of the lease. If it does not acquire title at the end of the lease, Tosco must still pay 75 to 80 percent of the loan's value, making acquisition of title a foregone conclusion. Tosco and Clover Trust intended that the transaction be treated as a secured loan to Tosco for tax purposes, that Tosco be entitled to all the benefits of ownership, and that "all payments of Termination Value and Fixed Rent . . . be treated as payments of principal and interest, as the case may be." Tosco assumed all of the operational and casualty risks for the properties and all responsibility for their management, and for practical purposes has the attributes and burdens of ownership. Tosco has all responsibility to insure and maintain the properties,

must keep them free of liens, and have the right to sublease to the franchisees. Tosco's option to purchase the properties is effectively at a specified price, so that it bears the risk of depreciation, receives the benefits of appreciation, and is responsible for compliance with the environmental laws.

13. If the Clover Trust lease were to terminate before any franchise agreement terminated, an addendum sent to the franchisees stated that "Tosco will exercise its option (or first right) to purchase the real property and improvements from the Clover Trust," after which the franchisees would lease their premises lease directly from Tosco, "rather than indirectly through the underlying lease" with Northwest. The Addendum further stated:

> if Tosco has determined to non-renew or terminate this Agreement, or any renewal thereof, pursuant to a provision of the Petroleum Marketing Practices Act (PMPA) which gives you the right to receive an offer to purchase the service station premises, you will receive from Tosco either a bona fide offer or a right of first refusal to purchase the marketing premises.

14. Once the transactions between Union Oil and Tosco were completed, including the renewal of the franchises, disputes commenced with a small percentage of the California franchisees whom asserted a desire to purchase the premises on which they were operating.

15. The Simmons group filed a complaint and sought an injunction, declaratory judgment, and constructive trust against Tosco, Union Oil and Unocal. It alleged, among other things, that Union Oil violated the PMPA by entering into

and renewing franchise agreements after it had decided to withdraw from the market, and by utilizing the synthetic lease financing. It also alleged that Tosco violated the PMPA because it purportedly failed to offer non-discriminatory franchises. The district court granted summary judgment against the group and it appealed to the Ninth Circuit.

16. The Hindi group also filed a separate complaint and sought an injunction, declaratory judgment, and constructive trust against Tosco, Union Oil and Unocal. It alleged that they violated the PMPA by utilizing synthetic lease financing. The district court granted summary judgment against the group and it, too, appealed.

17. On May 19, 1999, the court of appeals affirmed the district court's grants of summary judgment in total. The court of appeals published an opinion addressing the PMPA issues, which were asserted by the four groups of plaintiffs. The court addressed the Simmons group's antitrust claims and a discovery issue raised by that group in an unpublished memorandum opinion.

18. As to the PMPA arguments, the court of appeals followed unanimous precedent in holding that Union Oil did not violate any timing requirements in connection with its withdrawal, as it did not determine to withdraw from the market until its Board of Directors approved a resolution authorizing Union Oil to enter into an agreement with Tosco. The court of appeals also found unpersuasive the contention that Tosco's decision to utilize synthetic leasing to finance a portion of the transaction violated section 2802(b)(2)(E)(iii)(II) ("subsection II") of the PMPA, stating

> [n]othing in either the logic and purposes of the PMPA, or specifically of subsection II, precludes a person to whom the franchisor's interest in the premises is transferred from financing the purchase and securing that financing with the premises themselves. It would be most peculiar if the PMPA did preclude financing arrangements.

Finally, the court of appeals concluded that Tosco's franchise offers, which were identical as to all the Union Oil franchisees and essentially mirrored their former franchise agreements with Union Oil, were not discriminatory.

19. As to the Simmons group's antitrust claims, the court of appeals affirmed the district court's grant of summary judgment, holding that the appellants' claimed injuries — the alleged loss of the opportunity to buy the service stations they operate and the possibility of increased wholesale prices from their own franchisor — were unfounded, constituting "rank speculation".

20. The Simmons group filed a Petition with this Court, asserting that the district court and court of appeals erred when they decided that Union Oil and Tosco properly adhered to the provisions of the PMPA. *See* 15 U.S.C. § 2802(b)(2)(E). The Simmons group further contends that the district court and court of appeals erred in concluding that petitioners did not suffer an antitrust injury and lacked antitrust standing.

21. The Hindi group filed a separate Petition asserting that the district court and court of appeals erred when they decided that Union Oil and Tosco properly adhered to the PMPA. Respondents address both Petitions in this consolidated brief.

ARGUMENT

The court of appeals correctly held that that Union Oil and Tosco properly adhered to the provisions of the PMPA with respect to: (1) the timing of the transaction; (2) the synthetic leasing financing mechanism chosen by Tosco; and (3) the offer of non-discriminatory franchises. The court's decision does not conflict with any decision of this Court or any decision rendered by the other circuits. Similarly, the court's ruling that the Simmons group did not suffer antitrust injury and lacked antitrust standing is fully consistent with the decisions of this Court and the other circuits. The Simmons Petition fails to cite any circuit decision or decision by this Court granting standing to franchisees in the context of a sale which, to the franchisees, merely has the effect of replacing one franchisor with another. None of these determinations warrants further review.

A. The PMPA Balances The Interests Of Franchisors and Franchisees

The PMPA was designed to offer additional protection to petroleum products franchisees from arbitrary or discriminatory termination of their franchise agreements or non-renewal of the franchise relationship. S. Rep. No. 95-731, at 18-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 877. But that was not the only concern, for Congress also felt that what was "[n]eeded is a single, uniform set of rules governing the grounds for termination and non-renewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to termination of a franchise or non renewal of a franchise relationship." *Id.* Moreover, as Congress noted "[p]articularly important is that legislation dealing with this subject recognize the importance

of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." *Id.* "[I]n an age of increasing corporate competition, the major firms must retain the freedom to seek greater economic efficiency through corporate reorganizations, mergers and acquisitions." *May-Som Gulf, Inc. v. Chevron USA, Inc.*, 869 F.2d 917, 919, 921 (6th Cir. 1989). " 'In a rapidly changing economy fixed preservation of business relationships may spell financial death to the detriment of *franchisees* as well as franchisors.' " *Id.* at 922 (citation omitted).

In the context of a market withdrawal, the statute provides as follows:

> [A] determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located [is a ground for termination of a franchise or non-renewal of a franchise relationship], if —
>
> (i) such determination —
>
> (I) was made after the date such franchise was entered into or renewed, and
>
> (II) was based upon the occurrence of changes in relevant facts and circumstances after such date; . . . and

(iii) in the case of leased marketing premises —

. . .

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

15 U.S.C. § 2802(b)(2)(E).

Respondents turn to the specific issues in this case.

B. The Timing of the Withdrawal Did Not Violate the PMPA

The Simmons group argues that Union Oil violated the PMPA because it engaged in preliminary discussions about possible withdrawal options before franchises were renewed with group members and because relevant circumstances did not change after those franchises were renewed. *See* 15 U.S.C. § 2802(b)(2)(E)(i). Following unanimous

precedent, the court of appeals correctly found this argument unpersuasive. The Simmons petitioners cite no case supporting their position.

In order to meet the terms of 15 U.S.C. § 2802(b)(2)(E)(i)(I), Union Oil's actual decision to withdraw from the market must have been made after the date that the franchisees' franchises were entered into or renewed. The latest franchise renewal was October 1, 1996. The district court and court of appeals both ruled that the withdrawal determination was made on December 2, 1996, when Unocal's board approved a resolution authorizing Union Oil to enter into an agreement with Tosco. Thus, Union Oil met the requirements of § 2802(b)(2)(E)(i)(I).

In so ruling, the lower courts followed unanimous precedent. Generally, the approval of the franchisor's Board of Directors constitutes the legally effective date of a decision for PMPA purposes. *See May-Som*, 869 F.2d 917, 919, 927 (6th Cir. 1989) (holding that date franchisor's Board of Directors conditionally accepted buyer's bid was date market withdrawal decision was made); *Anderson v. Chevron Corp.*, 933 F. Supp. 52, 59 (D.D.C. 1996) (holding that "the day when the Board of Directors of defendant Chevron [the outgoing franchisor] tentatively approved the proposed exchange of assets with Exxon [the incoming franchisor], and instructed [its officers] to negotiate [and] execute a final exchange agreement" was date of market withdrawal decision). As the court of appeals noted, the logic of these cases is compelling. Weighing options is not the same as making a decision, and, absent evidence to the contrary, a corporation is not bound until its board acts. As the franchisees' own references to the evidence in the record indicate, years of considerations, negotiations, and false starts

had preceded the eventual deal with Tosco, and this, contrary to the franchisees' reasoning, suggests that courts should be wary about finding a fixed determination to withdraw at any point prior to the board's authoritative decision. Because none of the franchises was entered into or renewed after the decision to withdraw was made, the PMPA was not violated in this respect.

By the same token, the relevant facts and circumstances clearly changed after October 1, 1996, because only after that date was the sale to Tosco negotiated and a decision to withdraw reached. Therefore, 15 U.S.C. § 2802(b)(2)(E)(i)(II) was not violated either. *See May-Som Gulf*, 869 F.2d at 926 ("the presence of a willing and acceptable buyer is a fundamental change in market conditions").

The Simmons Petition fails to cite any decision that has held to the contrary. No further review is warranted.

C. Tosco's Use of Synthetic Leasing To Finance A Portion of the Transaction Did Not Contravene The PMPA

Petitioners also claim a violation of the PMPA because Tosco chose to utilize synthetic leasing as a means to finance its acquisition of a portion of the assets. The district court and court of appeals correctly determined that the PMPA does not prohibit financing techniques such as synthetic leasing, and that the franchisees were fully protected in the manner intended by the PMPA through the offer of new, non-discriminatory franchise agreements by Tosco that enabled the franchisees to continue operating their businesses in exactly the same manner as they had been doing before.

Petitioners do not point to any decision by this Court, or any decision by other circuit courts, holding synthetic leasing to be violative of the PMPA. Indeed, petitioners fail to cite any decision that has considered this truly arcane financing issue in the context of the PMPA. No further review is warranted.

When a franchisor terminates or nonrenews existing franchises or franchise relationships as part of a market withdrawal, section 2802(b)(2)(E)(iii) provides that the franchisor can either: (I) grant the franchisee a chance to match a bona fide offer to purchase the premises; or (II) sell, assign, or transfer the franchisor's interest to another person who will offer a non-discriminatory franchise to the franchisee.

Subsections (I) and (II) apply in different situations. Subsection (I) by its plain language contemplates a situation in which the withdrawing franchisor does *not* seek to sell the particular franchise as part of a transfer of its interest in multiple service stations to a new franchisor. *See, e.g., Avramidis v. Arco Petroleum Products Co.*, 798 F.2d 12, 15 at n.7 (1st Cir. 1986) ("Because Shell's purchase offer included some 400 Arco franchises, as well as numerous other assets, Subsection (E)(iii)(II) — requiring only that the purchasing franchisor offer the dealer a nondiscriminatory franchise — applied, rather than Subsection (E)(iii)(I) whose 'right of first refusal' provision contemplates the sale of a single franchise."). Recognizing that the franchisee should have greater rights in the service station property than a random buyer of the premises, the PMPA requires a franchisor who proceeds under this section to provide the franchisee the opportunity to purchase the premises so that the franchisee may continue its business in that location.

By contrast, Subsection (II) contemplates the situation when, as here, the withdrawing franchisor seeks to sell its interests in multiple service stations as a going concern to another franchisor. *See, e.g., Avramidis*, 798 F.2d at 15 n.7. Subsection (II) protects the franchisees from arbitrary or unfair treatment by the new franchisor by guaranteeing that the dealers will receive replacement franchises on fair terms, and thus can continue to remain in business at that location, as franchisees of the new franchisor. Subsection II requires that the old and new franchisors act in a manner consistent with "the overriding purpose of . . . the PMPA . . . to protect the franchisee's reasonable expectation of continuing the franchise relationship." *See Ellis v. Mobil Oil*, 969 F.2d 784, 788 (9th Cir. 1992).

The Petitioners argue that the terms of subsection II have not been met, nor can they be, because Clover Trust, the holder of legal title to the premises under the secured financing, is not a franchisor capable of offering nondiscriminatory franchises to the former Union Oil franchisees. The court of appeals correctly observed that this argument "is far too simplistic." That Clover Trust is not a franchisor, and cannot authorize anyone to use a trademark in connection with fuel sales, is legally irrelevant. The synthetic lease arrangement involving Clover Trust should not be considered a violation of subsection II, because Clover Trust is part of a special purpose financial arrangement whereby Tosco purchased the property, and Tosco was indeed capable of offering — and did offer — non-discriminatory franchises to the former Union Oil franchisees.

Nothing in either the logic and purposes of the PMPA, or specifically of subsection II, precludes a person to whom

the franchisor's interest in the premises is transferred from financing the purchase and securing that financing with the premises themselves. It would be most peculiar if the PMPA did preclude financing arrangements. The use of secured financing can facilitate large transactions like the one at hand, without adding any untoward instability to franchise arrangements. In that regard, in enacting the PMPA Congress did not wish to unduly interfere with the interests of the franchisor, who is, after all, the owner of the property involved. *See May-Som Gulf*, 869 F.2d at 921; *Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1391-92 (9th Cir. 1986). Union Oil had an interest in capitalizing on the investments it had made in the corporate identity and goodwill of the Union 76 brand, and it could fully recover that investment if it could sell a going concern, including trademarks, franchise operations, and service station premises.

The PMPA does not contain any internal definition of ownership, although it is rather expansive in its definition of "leased marketing premises," which it defines as premises "owned, leased, or in any way controlled by the franchisor." 15 U.S.C. § 2801(9); *see also Fresher v. Shell Oil Co.*, 846 F.2d 45, 46-47 (9th Cir. 1988). Tosco's control of the premises is absolute and real. Indeed, general law treats synthetic lease arrangements as transparent for tax and other legal purposes. The entire point of a synthetic lease is that it is treated as an operating lease for accounting purposes, but is otherwise regarded by all concerned, including the government, as a secured loan.[1]

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1. *See, e.g., Sun Oil Company v. Commissioner of Internal Revenue*, 562 F.2d 258 (3d Cir. 1977); Revenue Procedures 75-21, 75-28, 76-30; *Moreggia & Sons, Inc. v. Walsh*, 852 F.2d 1179 (9th Cir. 1988) (the test is the intent of the parties and the economic

(Cont'd)

The contention by the Hindi petitioners that the court of appeals' opinion contradicts other circuit decisions is meritless. (Hindi Pet. at 15) None of the three cases cited by petitioners involved synthetic leasing or any other issue involving financing. *See Avramidis*, 798 F.2d 12 (1st Cir. 1986); *John & Kostas Service Station Inc. v. Cumberland Farms, Inc.*, 948 F.2d 821 (1st Cir. 1991); and *Ewing v. Amoco Oil Co.*, 823 F.2d 1432 (10th Cir. 1987). The *Avramidis* matter involved issues relating to PMPA notice and discrimination; the *Kostas* matter involved whether the new franchisor offered discriminatory franchises; and the *Ewing* case also involved issues of discrimination by the new franchisor. Nothing about those cases even remotely suggests that the decision by the new franchisor to utilize synthetic leasing violates the PMPA.

The court of appeals correctly observed that the result of the individual arrangements was a single transaction whereby Tosco took over the ownership and franchise role formerly held by Union Oil. *See Sun Oil Co. v. C.I.R.*, 562 F.2d 258, 268-69 (3d Cir. 1977). In other words, as the court of appeals stated, "there is no reason to hold that an arrangement which is seen as a transparent financing arrangement with true ownership in a Tosco entity for other legal purposes should become opaque when we look at it through a PMPA lens."

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substance of the arrangement, not the locus of title). *See also In re PCH Associates*, 804 F.2d 193 (2d Cir. 1986) (holding that the lease in a sale-leaseback financing transaction was not a "lease" for purposes of section 365, looking at the economic realities of the transaction); *In re Independence Village*, 52 B.R. 715 (Bankr. E.D. Mich. 1985) (the lease-purchase contract was determined, in substance, to be a security agreement giving the lessor an equitable mortgage in the real property; court based conclusion on its analysis of the intentions of the parties and the economic substance of the transaction).

Moreover, to allay any franchisee concerns, Tosco included in the Addendum to the franchise agreement a statement that it will purchase the property from Clover Trust if the lease ends before the termination of the franchise agreement. The Addendum also guarantees the franchisees a right of first refusal pursuant to the terms of the PMPA in case of non-renewal or termination. Thus, Tosco is contractually bound in its franchise agreement to protect the franchisees' expectations of an ongoing franchise relationship. That, again, underscores Tosco's understanding that in reality its obligations and rights are the same as they would be under a more conventional mortgage. It is a foregone conclusion Tosco will acquire legal title at the end of the synthetic lease term because the effective financial penalties would be very steep.

The franchisees have not shown any interests put at risk by the method used to sell the premises to Tosco. They are operating under the same franchise terms, and their reasonable expectations of a continuing franchise relationship have not been thwarted by the use of the synthetic lease. The franchisees are all exactly where they reasonably could have expected to be under the franchise agreements they made as retailers of 76 brand motor fuel had a more conventional financing arrangement been used. Life goes on as before, and they are receiving precisely the benefit of the franchise relationship for which they bargained. The synthetic lease should, therefore, be treated as the financing vehicle it is, and for PMPA purposes Tosco should be looked upon as the transferee. The court of appeals did not err in concluding that Subsection II was not violated by its use.

D. Tosco's Franchise Offers Were Not Discriminatory

The Simmons group asserts that the court of appeals erred in holding that Tosco's offers of new franchises were not discriminatory. *See* 15 U.S.C. § 2802(b)(2)(E)(iii)(II). The court of appeals did not err, and its ruling was consistent with the unanimous precedent. Indeed, Petitioners do not point to any decision holding to the contrary. No further review is warranted.

Under the PMPA, a franchisor may sell its franchise to another franchisor so long as the new franchisor "offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person **or** franchises then in effect and with respect to which such other person is the franchisor." § 2802(b)(2)(E)(iii)(II). (Emphasis supplied) Each location has a unique set of considerations based, for example, on its particular competitive situation or the contract terms already in place for existing, similarly situated franchisees. By phrasing subsection (E)(iii)(II) in the disjunctive, Congress understood the importance of providing the franchisor with the business flexibility to provide a new franchisee with the offer of a franchise that is comparable either to the other new franchises being offered *or* to existing franchises that may be more relevantly situated.[2]

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2. For example, if the franchisor acquires additional franchises in the context of a market withdrawal, it may make business sense to offer leases to some of the new franchisees on terms that differ from each other but that mirror existing franchises in similar relevant circumstances (i.e., all service stations in XXXX County might be full-serve and operate 24 hours, which is expected by the residents

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The terms of a franchisee's new franchise agreement need not be identical to those of every other franchise agreement; "[a] franchisor must be free to offer different terms at different franchise locations." *Ewing*, 823 F.2d at 1438. "The PMPA . . . only requires that the franchise terms be similar, i.e., not discriminatory, to other franchises currently in effect or currently being offered by the purchasing franchisor." *Southern Nevada Shell Dealers Ass'n v. Shell Oil Co.*, 725 F. Supp. 1104, 1109 (D. Nev. 1989); *see also Avramidis*, 798 F.2d at 13-14.

The "good faith" requirement looks to whether the franchisor's actions are intended to "conceal selective discrimination against individual franchises," *Southern Nevada Shell Dealers*, 725 F. Supp. at 1109, but "avoid[s] judicial scrutiny of the business judgment itself." *Id.*, *citing Siecko v. Amerada Hess Corp.*, 569 F. Supp. 768, 772 (E.D. Pa. 1983). In the context of grounds for nonrenewal under § 2802(b)(3)(A) of the PMPA, courts have similarly sought to inquire into "good faith" without engaging in

> judicial second-guessing of "the economic impact of an otherwise legitimate business decision by the franchisor. So long as the franchisor does not have a discriminatory *motive* or use the altered terms as a pretext to avoid renewal, the franchisor has met the burden required by the PMPA for determining good faith."

Valentine, 789 F.2d at 1392 (emphasis supplied).

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and necessary in order to be competitive). On the other hand, for legitimate business reasons, the franchisor may want to provide all of the new franchisees with agreements materially similar to each other but that differ in some respects from existing leases which may not be relevantly situated or which may contain outdated terms that will be revised upon expiration of the existing franchises.

The Simmons group does not dispute that the franchise agreements offered by Tosco were essentially the same for each of the former Union Oil franchisees or that they mirrored those which the franchisees had with Union Oil. Their sole argument that they were offered "discriminatory" franchises is that Tosco's BP brand franchises outside California provided that the franchisees' rent shall remain the same throughout the lease term, whereas the new 76 brand franchises provide for yearly rent increases based on a formula tied to the consumer price index. Petitioners fail to point out that this provision, which they claim to be "discriminatory," was in their former Unocal agreements. It was merely carried through by Tosco in the replacement franchises as part of Tosco's efforts to have the new franchises mirror their former franchises, thereby minimizing any disruption from the change in franchisor.[3]

The district court and court of appeals did not deem it necessary to determine whether the PMPA requires any comparison to BP franchises in a different region because they correctly concluded that, even if such a comparison were required, the differences between the 76 and BP agreements would not amount to discrimination against the "76" franchisees. The Simmons petitioners fail to offer any evidence whatsoever that this one asserted difference between their 76 franchises and then-existing BP franchises was based on a discriminatory motive or that it was inserted in their leases as a pretext to disenfranchise them. Without a shred of evidence of any pretext or a discriminatory motive,

3. Indeed, the new 76 brand franchises offered to Appellants became the template for Tosco's existing franchises elsewhere, and Tosco's renewals of its BP leases in the Pacific northwest (and its Exxon franchises in Arizona) now also contain a rental increase provision.

they cannot establish their discrimination claim under the PMPA as a matter of law. All the more so here, when what Tosco decided to do was to offer its new franchisees precisely the terms they were accustomed to, rather than alter them. It is hard to see how use of the "76" franchise terms, which the franchisees had been living with for years, became evidence of bad faith when offered by Tosco, the new owner of the 76 brand. The mere fact that the amount of rent might differ from one place to another does not show discrimination. *See Southern Nevada Shell Dealers*, 725 F. Supp. at 1109. That is especially true when, as here, the complaining group members are all located in California, whereas the agreements to which they wish to be compared refer to franchisees in other states, who were accustomed to a different leasing regime.

The court of appeals and district court correctly found that the franchisees did not demonstrate any lack of good faith in Tosco's offer of franchises to them, and that they cannot show that they have been treated in a discriminatory fashion.

E. The Court of Appeals Correctly Concluded That The Simmons Group Had Not Suffered Antitrust Injury and Lacked Antitrust Standing

The court of appeals did not err in concluding in its unpublished memorandum that the Simmons group had not suffered antitrust injury and lacked antitrust standing. The Simmons group fails to point to any split in the circuits on this issue. Indeed, they do not cite to any decision whatsoever holding that petroleum franchisees suffer a cognizable antitrust injury and have antitrust standing to sue in circumstances such as this. The Simmons petitioners suffered no antitrust injury and lacked standing to assert any such claims.

The Simmons group asserts that the transfer of the Union 76 franchise interests and premises to Tosco was an antitrust violation under Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits combinations in restraint of trade, and Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits acquisitions that may lessen competition. An antitrust plaintiff must demonstrate that the injury in question is "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977). If relief is sought under Section 4, the plaintiff must demonstrate standing, which is tested by the application of a number of factors, which seek to assure, among other things, that the asserted damage is not a matter of mere speculation as far as the plaintiff is concerned, and that, even if there were some damage, the plaintiff is truly an appropriate person to assert it for antitrust purposes.

Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 538, 103 S. Ct. 897, 908, 74 L. Ed. 2d 723 (1983); *R. C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 146 (9th Cir. 1989) (en banc). Section 16 is not quite as demanding, but it at least requires a showing that there is a significant threat impending. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S. Ct. 1562, 1580, 23 L. Ed. 2d 129 (1969).

Petitioner's first claimed injury — loss of the right under the PMPA to purchase and own their currently leased stations — is related to the structure of the acquisition; specifically, whether it violated the PMPA.[4] This alleged injury is unrelated

4. Ironically, it is the fact of the acquisition that allegedly gives rise to Appellants' asserted rights under the PMPA and California statute to buy their leased stations. In other words, but for the

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to any purported decrease in competition resulting from the acquisition. For example, if Unocal had sold its assets under an identical deal to a new market entrant, thereby resulting in no increase of market share, Petitioners would still have lost the asserted right to purchase their own stations. This alleged injury is not proximately caused by any asserted anticompetitive effects of the asset purchase. Clearly, it does not reflect "the type of loss that the claimed violations . . . would be likely to cause," and does not give rise to antitrust standing. *Brunswick*, 9 U.S. at 489. Moreover, there is not the slightest hint that Union Oil would have otherwise sold off its roughly $2,000,000,000 going concern in bits and pieces if it had not sold to Tosco, and that some benefit would thereby have been conferred upon the group members through individual offers of sale bu Union Oil to them.

The Simmons group argues that the court of appeals' opinion fails to address its other purported injury, namely, that the mere switch in franchisor might result in increased wholesale prices to them. (Simmons Pet. at 20). They are incorrect. The court of appeals specifically rejected that purported speculative injury. It stated, assuming the existence of additional market concentration for the sake of argument, that while "added concentration might threaten other wholesalers of gasoline, independent dealers, and consumers, there is little reason, and no evidence, to suggest that these franchisees are threatened by their own franchisor."[5] (Simmons Pet. App. at 39). The Court added:

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allegedly anticompetitive acquisition, Appellants could not claim the alleged right to purchase. Therefore, the alleged anticompetitive acts of Unocal and Tosco simultaneously create and injure the same right. Appellants have alleged irreconcilably inconsistent positions.

5. Respondents note that the Tosco sale did not increase market concentration given that Tosco occupied less than one percent of the relevant market before the acquisition.

> We understand the desire of the group's members to escape the strictures of a franchise relationship and to sally forth on their own, but there is no indication that the frustration of that desire threatens an antitrust injury. At best, the assertion that they may be harmed is rank speculation which does not disclose a significant threat. *See*, e.g. *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 582-87, 590-91, 592-95 (3rd Cir. 1979).

The court of appeals correctly observed that, even if the franchisor were able to charge higher prices, the "franchisees are actually allies of their franchisor as all of them face the marketing efforts of others." *Id.*

Indeed, the franchisees cannot claim to be affected either by a decrease in competition between Tosco and Unocal or by any alleged general decrease in competition within the wholesale motor fuel market. Prior to the acquisition, there was no competition between Tosco and Unocal (or any other supplier) in the supply of motor fuel to Petitioners. They do not dispute that they were, and remain, "76" brand franchisees, bound by their former and current franchise agreements to purchase all of their motor fuel requirements directly from their franchisor — formerly Unocal and now Tosco. Quite simply, they do not participate and have never participated in a competitive market for the purchase of wholesale motor fuel. Petitioners cannot allege injury for price increases in a market in which they were not participants. *See Vinci v. Waste Management, Inc.*, 80 F.3d 1372, 1376 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1252 (1997), *quoting Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985).

Thus, even assuming that at some point there is an increase in the price of the "76" brand wholesale motor fuel that petitioners are now obligated to purchase from Tosco, that increase would not be the result of a lessening in competition, because there is not and has never been any competition in the sale of "76" brand wholesale motor fuel to them. Therefore, the court of appeals correctly determined that the Simmons group's speculation about possible wholesale price increases cannot constitute a cognizable antitrust injury suffered by them.[6]

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6. Accordingly, Petitioners' argument that they stand in the position of consumers or customers of the merged entity is without merit. They are branded franchisees who do not purchase their motor fuel on the wholesale open market, as might an independent dealer or a wholesale gasoline distributor. The Simmons group's citation to *Nelson v. Monroe Regional Medical Center*, 925 F.2d 1555 (7th Cir. 1991) thus is inapposite. In *Nelson*, the plaintiffs were patients of a medical center that merged with the only other health care provider in plaintiffs' hometown of Monroe, Wisconsin — an entity which plaintiffs had previously sued. The merged entity then refused to treat them. The Seventh Circuit held that the defendant's decision not to treat them was a direct result of the exercise of its market power and that but for the merger and the resultant monopoly, the plaintiffs might still be enjoying medical care in Monroe. In contrast, these petitioners are not "consumers" directly harmed by any alleged elimination of competition. They are branded franchisees in the exact same position now as they were when Unocal was their franchisor. Similarly, there is nothing about the *California v. American Stores Company*, 495 U.S. 271 (1990), decision that suggests that the Simons petitioners possess antitrust standing.

CONCLUSION

The petitions for a writ of certiorari filed by the Simmons and Hindi petitioners should be denied.

Respectfully submitted,

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